

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)
FOR TRANSFER NO. 5691 IN THE)
NAME OF JEROME CHEESE)
COMPANY)

**ORDER DENYING MOTION
FOR ATTORNEY'S FEES**

Jerome Cheese Company filed a Motion for Attorney's Fees, Witness Fees, and Reasonable Expenses, pursuant to Idaho Code § 12-117(1), seeking to recover these costs from the City of Jerome. The Idaho Department of Water Resources denies the request for fees and expenses on the grounds that the City of Jerome acted with a reasonable basis in fact and law in objecting to Jerome Cheese's transfer application.

BACKGROUND

This proceeding is an action before the Idaho Department of Water Resources ("Department") to transfer the point of diversion, place of use, season of use, and nature of use of parts of decreed water right nos. 36-02461 and 36-02554 in the name of Jerome Cheese Company ("Jerome Cheese" or "applicant"). Application for Transfer No. 5691 ("application") was filed on March 15, 2000. The City of Jerome ("city" or "protestant") filed an objection to the application on April 7, 2000.

The Department held a hearing on the protested application in Twin Falls on July 25 and 26, 2000. The Department hearing officer, Glen Saxton, presided over the hearing. Attorney Christopher H. Meyer represented Jerome Cheese. Attorney Patrick D. Brown represented the city. At the hearing, sworn testimony was received, exhibits were admitted into evidence, and the application was taken under advisement by hearing officer Saxton.

The primary issue before the Department was whether the economic impact of a departing municipal water customer on the remaining water customers of the city was within the purview of the local public interest criterion of Idaho Code § 42-222 (Finding of Fact No. 7 of Final Order dated November 24, 2000). Thereafter, the Department answered this question in the affirmative, finding that the economic impact of a departing municipal water use customer on the remaining water customers of the city is within the purview of the local public interest criterion and that the Department must consider it (Conclusion of Law No. 6 of Final Order dated November 24, 2000). However, in considering the local public interest, the Department determined that the economic cost to the city and its customers in comparison to other public interest factors did not warrant denial of the transfer application or compensation to the city for lost revenues resulting from the transfer (Conclusion of Law No. 14 of Final Order dated November 24, 2000).

Jerome Cheese subsequently filed its Motion and Brief in Support of Motion for Attorney's Fees, Witness Fees, and Reasonable Expenses. The City thereafter filed its Brief in Opposition to Jerome Cheese's Motion for Attorney's Fees. In support of its motion, Jerome Cheese asserts that it is entitled to attorney's fees and related expenses pursuant to Idaho Code § 12-117(1). Jerome Cheese argues that it is entitled to these fees because the Department found in its favor by granting the water rights transfer and because the city acted without a reasonable basis in fact or law when it objected to the proposed transfer. In its brief, the city argues that it had a reasonable basis in fact and law for its objection.

DEPARTMENT'S AUTHORITY TO GRANT ATTORNEY'S FEES

Generally, an administrative agency has no power to award attorney's fees unless specifically authorized by statute or agreement between parties. See *Idaho Power Co. v. Idaho Public Utilities Comm'n*, 102 Idaho 744, 750, 639 P.2d 442, 448 (1981). Idaho Code § 12-117(1) provides a narrow statutory exception to the general rule. Under this statute, a court is authorized to

award attorney's fees and other expenses to private parties who prevail in litigation with certain governmental entities. Specifically, Idaho Code § 12-117(1) (1999)¹ states:

In any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the person reasonable attorney's fees, witness fees and reasonable expenses, if the court finds in favor of the person and also finds that the state agency, the city, the county or the taxing district acted without a reasonable basis in fact or law.

In 1989, the Idaho Supreme Court held that the power to award fees and expenses under Idaho Code § 12-117(1) rests not only with a court, but also with an administrative agency. *Stewart v. Department of Health and Welfare*, 115 Idaho 820, 822-23, 771 P.2d 41, 43-44 (1989). This reading is supported by subsequent case law. See *Ockerman v. Ada County Bd. of Comm'rs*, 130 Idaho 265, 267, 939 P.2d 584, 586 (Ct. App. 1997). The fees and expenses under Idaho Code § 12-117(1) are not discretionary. Attorney's fees and expenses shall be awarded if: (1) the court finds in favor of the person²; and (2) the governmental party in the litigation acted without reasonable basis in fact or law. See *State, Dep't of Fin. v. Resource Service Co. Inc.*, 134 Idaho 282, 283-84, 1 P.3d 783, 784-85 (2000).

APPLICATION OF IDAHO CODE § 12-117(1)

Under Idaho Code § 12-117(1), the first test is that the agency must have found "in favor of" the non-governmental litigant. Applied to this case, the first test has been met as the Department approved the transfer application, even though a significant legal issue was decided in

¹ This statute was recently amended to permit recovery of attorney's fees by the "prevailing party" and not just by a "person" in the action. See 2000 Idaho Sess. Laws 675. However, the 2000 amendment does not apply to this proceeding. Section 2 of the session law states, "This act shall be in full force and effect on and after July 1, 2000, and shall apply to all administrative or civil actions filed on or after the effective date of this act." *Id.* at 676. The transfer application that initiated this contested case was filed on March 15, 2000. Thus, since the transfer application was filed before the effective date of the 2000 amendment, the amendment is not applicable to this case.

² Person is defined broadly and includes corporations. See Idaho Code § 12-117(4)(a).

the city's favor. Jerome Cheese filed Application for Transfer No. 5691 with the Department, requesting a water right transfer of 2.7 cubic feet per second ("cfs") and 516 acre feet per annum ("AFA"). The Department's Final Order dated November 24, 2000, approved the transfer in the full amount requested. Thus, under the plain meaning of the language in Idaho Code § 12-117(1), the Department has ruled "in favor of" Jerome Cheese.

The second inquiry under Idaho Code § 12-117(1) is whether the city acted with a reasonable basis in fact and law. A number of Idaho Appellate cases have examined what qualifies as acting "without a reasonable basis in fact or law" under Idaho Code § 12-117(1). Courts have imposed attorney's fees and expenses where a governmental litigant acted without statutory authority, *Lockhart v. Department of Fish & Game*, 121 Idaho 894, 828 P.2d 1299 (1992); and when a governmental agency acted beyond the authority of a punishment provision of its own rules, *Moosman v. Idaho Horse Racing Comm'n*, 117 Idaho 949, 793 P.2d 181 (1990). Requests for fees under Idaho Code § 12-117(1) have been denied where a governmental party advanced a reasonable, though erroneous, interpretation of an ambiguous statute. See *Rincover v. State, Dep't of Fin.*, 132 Idaho 547, 976 P.2d 473 (1999); *Cox v. Department of Ins.*, 121 Idaho 143, 823 P.2d 177 (Ct. App. 1991); *Idaho Potato Comm'n v. Russet Valley Produce, Inc.*, 127 Idaho 654, 904 P.2d 566 (1995).

The Department finds that this case closely resembles the situation in *Rincover*, *Cox* and *Idaho Potato Comm'n*. The city has advanced a reasonable interpretation of an ambiguous statute, even though the Department ultimately disagreed with the application of the facts of this case to the statute. As noted previously, the city objected to the application of Jerome Cheese to transfer water rights on the basis that it was not in the local public interest. Specifically, the city argued that the economic effect of a departing municipal water use customer on the remaining water customers should be included within the purview of the local public interest. In addition, the city argued that the specific loss of revenue facing the city was significant enough to warrant protection under the

local public interest statute. Jerome Cheese countered, arguing that the economic effect of a departing municipal water customer on the remaining customers is not part of the local public interest.

To support their argument, the city relied on the definition of the local public interest in Idaho Code § 42-203A and the Idaho Supreme Court case *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985). The “local public interest” is defined broadly as “the affairs of the people in the area directly affected by the proposed use....” Idaho Code § 42-203A(5)(e). The Idaho Supreme Court in *Shokal* recognized the vagueness in the legislature’s definition of the local public interest. The court laid out a number of different elements of the local public interest, but also realized that the list was not exhaustive and that elements of the local public interest will not have equal weight in every situation. *Shokal*, 109 Idaho at 338-39, 707 P.2d at 449-50. The court realized that the local public interest was a fact based investigation and that the local public interest varies in different cases. *Shokal*, 109 Idaho at 339, 707 P.2d at 450 (“The relevant elements and their relative weights will vary with local needs, circumstances and interests.”). The court stated that ultimately, the determination of what elements of the public interest are impacted and what the public interest requires is committed to the Department’s sound discretion. *Shokal*, 109 Idaho 330, 339, 707 P.2d 441, 450.

The Department agreed with the city and found that the economic impact of the transfer on the city was part of the local public interest. This was based upon the broad definition of the local public interest set forth in Idaho Code § 42-203A(5) and the broad analysis required under *Shokal v. Dunn* (see Conclusion of Law Nos. 1 - 3 of the Final Order dated November 24, 2000). However, the Department determined that the economic costs to the city do not outweigh the economic and operational interests of the applicant and resulting benefits (see Finding of Fact No. 24 of Final Order dated November 24, 2000). The Department further determined that the economic impacts would not cause excessive harm to the city (see Conclusion of Law No. 7 of Final Order dated

November 24, 2000). When the economic impact to the city was weighed against other public interests, the Department approved the transfer application. However, this does not mean that the city's arguments were without a reasonable basis in fact or law. The questions presented in this case were questions of first impression before the Department. This, coupled with the vague nature of the local public interest and the broad discretion given to the Department in determining what is in the local public interest, suggests that some flexibility should be afforded in litigating these issues.

The purpose of Idaho Code § 12-117 is to: (1) serve as a deterrent to groundless or arbitrary action; and (2) provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never have made. See *Rincover*, 132 Idaho at 549, 976 P.2d at 475. The Department cannot find that the argument by the city was groundless, arbitrary, or required Jerome Cheese to bear an unfair or unjustified expense. Therefore, the Department cannot hold that the City of Jerome acted without a reasonable basis in law or fact.

IT IS, THEREFORE, HEREBY ORDERED that the applicant's motion for an award of attorney's fees before the Department in this proceeding is DENIED.

IT IS FURTHER ORDERED that this is an Interlocutory Order and that this order shall be considered part of the Department's final order on Application for Transfer No. 5691.

DATED this 24th day of November, 2000

Signed
Karl J. Dreher
Director